

Confidential for Members

Ross vs. Philip Morris, Inc.

The reading of the deposition of Dr. Michael Shimkin was resumed Tuesday morning. Dr. Shimkin was asked the same long hypothetical question that had earlier been addressed to Dr. Kenneth Devine (see report No. K5-62). Dr. Shimkin responded that by smoking, Ross increased his cancer risk from six to ten times. Dr. Shimkin further stated that it was more than probable that Ross would not have developed the cancer if he had not smoked.

In cross-examination, Dr. Shimkin granted that alcohol, nutritional deficiencies, viruses, residence (urban or rural) and sex might be factors or suspects (but not infections per se, nasal deviation or dental sepsis).

Defense counsel Hardy moved that Dr. Shimkin's response to the hypothetical question be stricken from the record because the witness's answers showed that he had been misled as to the location of Ross's cancer by the question. The judge sustained the objection and instructed the jury to ignore that part of Dr. Shimkin's testimony, noting that the hypothetical question, because misleading, could not be probative.

Hardy thereupon moved to strike the entire deposition on the ground that Dr. Shimkin was talking about another kind of cancer than that suffered by Ross, the deposition was not relevant to the case. Judge Gibson ruled that there was material of value in the remainder of the deposition, but cautioned the jury not to confuse one kind of cancer with another. The judge also instructed the jury that testimony relating the history of literature on cancer is not substantive and could only go to the question of notice.

Plaintiff's attorney Field then read to the jury excerpts from the cross-examination in the deposition of Dr. Alton Ochsner. Hardy objected that this material dealt almost entirely with lung cancer, a subject which the defendant had raised in the questioning because the complaint included an allegation of lung cancer. Since the plaintiff later conceded that his cancer was not in the lung, such material was now irrelevant and prejudicial, Hardy argued. He was overruled. He then read to the jury all the rest of Dr. Ochsner's cross-examination that had been ready by Field.

Hardy then moved that all of Dr. Ochsner's deposition be stricken, including what he had just read, because it contained the identical hypothetical question against which the judge had ruled in the Shimkin deposition. The judge ruled that it was not as apparent that Ochsner had been misled by the question, and therefore the matter should be decided by the jury.

Field also introduced Mr. and Mrs. John Sainich, "second-door neighbors" of Ross and his family for 11 years, who testified that during that period (1948-59) they never saw him drinking or drunk, nor did they take any particular notice of his smoking habits. In cross-examination, Mrs. Sainich said that the neighbor who lived between the two families once told her that Ross "drank."

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